No. 82-479

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT D. ORR,
AS GOVERNOR OF THE STATE
OF INDIANA, *et al.*
*Petitioners,*

v.

THE BOARD OF SCHOOL COMMISSIONERS
OF THE CITY OF INDIANAPOLIS, *et al.*,
*Respondents.*

**On Petition for Writ of Certiorari**
**To the United States Court of Appeals**
**For the Seventh Circuit**

## BRIEF OF RESPONDENTS BUCKLEY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

## QUESTIONS PRESENTED

1) Did the Court of Appeals err in holding that the Indiana Transfer Statute does not apply where racial discrimination by the State of Indiana is the basis for an interdistrict remedy?

2) Did the District Court abuse its discretion in prohibiting the State of Indiana from paying court-ordered desegregation costs from funds already appropriated for other educational purposes?

## STATEMENT OF THE CASE

On March 26, 1982, a three-judge panel of the United States Court of Appeals for the Seventh Circuit unanimously agreed on several holdings:

(1) The State of Indiana, a defendant guilty of an interdistrict violation of the constitution with respect to racial discrimination in public schools, was properly assessed all the costs of an inter-district remedy. (Petition for Certiorari, A-2).

(2) The Indiana Transfer Statute, I.C. 20-8.1-6.5-1 *et seq.*, which allocates certain school desegregation costs, by its own terms applies only to constitutional violations by a transferor school corporation and does not apply when, as here, the sole basis for an interdistrict remedy is an interdistrict violation by the State. (Petition, A-4, 5)

(3) Even if the Transfer Statute were applicable, the District Court would not necessarily be bound by its terms since the Tenth Amendment's reservation to the states of non-delegated powers is not implicated by a federal court judgment which enforces express prohibitions of the Fourteenth Amendment. (Petition, A-5, 6).

The only issue on which the panel divided is whether the District Court abused its discretion (as dissenting Judge Posner urged) or did not (as Judges Swygert and Cummings concluded) when the District Court, after allocating all remedial costs to the State of Indiana, went on in Section 6 of its order to prohibit the State from carving out desegregation funds from educational distributions currently appropriated by state law.

## SUMMARY OF ARGUMENT

The issues in this case are of little concern to others than the parties herein and are not likely to arise again. There is no conflict among the Circuits.

The Seventh Circuit correctly interpreted the Indiana Transfer Statute. Also, it properly found that the District Court did not abuse its discretion by insuring in its remedial order that money to pay the cost of desegregation was not obtained by reducing payments currently appropriated for educational purposes to the participating parties or to other school districts.

## ARGUMENT

1) The Indiana Transfer Statute allocates some of the costs of a court ordered desegregation remedy in one specified kind of situation. The State of Indiana contends that the Seventh Circuit did not give appropriate deference to that statute. (Petitioner's brief, 4). To the contrary, however, the Court of Appeals fully considered the statute but held, correctly, that it did not apply to the facts of this case.

The Court first pointed out that the Indiana Transfer Statute, by its own terms, applies only where a transferor corporation has violated the equal protection clause of the Fourteenth Amendment to the Constitution of the United States by practicing *de jure* racial segregation of the students within its border. (Petitioner's Brief, A-4). The Court of Appeals next pointed out that this case involves the remedy for interdistrict violations for which the State of Indiana is responsible. (Petitioner's Brief, A-4, 5). It follows, therefore, as the Seventh Circuit held, that the Transfer Statute is not applicable to the case.

Even if the Seventh Circuit's interpretation of the statute was in error, the petition for a writ of certiorari should be denied. No parties other than the present litigants are likely ever to be affected by the decision and there is no conflict among the Circuits.

2) It is not of substantial importance to other states or even to Indiana whether Section 6 of the District Court's order was an abuse of discretion. The effect of Section 6 is that until the next session of the Indiana General Assembly, the cost of desegregation must first be paid from unappropriated funds and the State must not reduce payments under applicable state law to the participating parties or to any other school districts. However, when the General Assembly next meets in regular or special session, it can legislate whatever taxes and/or appropriations it thinks will best meet its obligations under the

desegregation order, provided only that it does not place the burden of the desegregation process on educational distribution funds. Section 6 thus has only a minor impact on the State's freedom to design its response.

Petitioner seeks to find a 10th Amendment issue in the case. However, the Chief Justice, writing for the Court in *Milliken v. Bradley*, 433 U.S. 267, 291 (1977), said that:

> The Tenth Amendment's reservation of non-delegated powers to the States is not implicated by a federal-court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment.

Further, the District Court wisely exercised its discretion. If Indiana had reduced its state-wide school distributions in order to pay for desegregation in Marion County, the success of the District Court's desegregation remedy might have been jeopardized by resentments.

The District Court wisely insured by Section 6 of its order that the costs of the desegregation process would be broadly shared by the people of Indiana and would not be taken from appropriations theretofore earmarked for educational purposes in the affected school districts and in other school districts.

## CONCLUSION

Wherefore, Respondents Intervening Plaintiffs Buckley pray the Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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